

HOUSE OF REPRESENTATIVES

COMMITTEE OF PRIVILEGES

**REPORT ON LETTER OF 6 SEPTEMBER 1990
FROM MR A ELDER OF DUNHILL MADDEN BUTLER
TO THE HONOURABLE MEMBER FOR CORIO**

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*(Nominee of the Leader of the House)

1. On 13 September 1990 the Hon G G D Scholes, MP raised, as a matter of privilege, a letter he had received from Mr A Elder of Dunhill Madden Butler of Melbourne. A copy of the Hansard record of Mr Scholes' statement in raising the matter is at Attachment A. A copy of the letter complained of, which was dated 6 September 1990, is at Attachment B.
2. Mr Speaker considered Mr Scholes' complaint and reported to the House on it on 17 September. Mr Speaker stated, inter alia, that he believed the case was a borderline one on which the House would benefit from the advice of the Committee of Privileges and that, accordingly, he would give priority to a motion. Mr Scholes then proposed the following motion, which was agreed to by the House:

That the letter of 6 September 1990 from Mr A Elder of Dunhill, Madden and Butler, to the honourable member for Corio be referred to the Committee of Privileges.

A copy of the Hansard record of the Speaker's statement is at Attachment C.

Conduct of inquiry

3. The committee sought a memorandum from the Acting Clerk of the House on the matter - a copy of the memorandum provided is at Attachment D. It sets out the basic constitutional and legislative provisions relevant to the complaint, and summarises precedents from the House of Representatives and the House of Commons (UK).
4. The committee resolved that Mr Scholes should be invited to appear before it, and he gave evidence on 11 October. The committee subsequently authorised the publication of the transcript of Mr Scholes' evidence.
5. Mr Scholes assisted the committee, confirming the authenticity of the copy of the letter from Mr Elder held by the committee, and its attachments, which included a copy of a letter over Mr Scholes' name addressed as follows:

"TO ALL BRANCH MEMBERS
AS ADDRESSED"

Mr Scholes' evidence also provided useful information to the committee on his actions in connection with the letter he had distributed. He was also able to explain to the committee and answer questions about his perception and understanding of the substance and implications of Mr Elder's letter of 6 September.

6. Several quotations from Mr Scholes' evidence are incorporated in this report, but the committee stresses that its conclusions have been based on the totality of the material before it, including the full transcript. A copy of the transcript of Mr Scholes' evidence will be tabled. It is necessary to read the full record to get a more complete understanding of Mr Scholes' position.

Substance of the complaint

7. In his statement to the House in raising the complaint on 13 September, Mr Scholes said, inter alia -

I claim, Mr Speaker, that the threat contained in the letter, if I were to comply with it, would inhibit me and prevent me in future from carrying out my duties as a member of this Parliament and thus would prevent this Parliament from having my services on a basis which I would think is right and proper (*House of Representatives Hansard*, p 1831).

8. In evidence, Mr Scholes indicated that the following parts of Mr Elder's letter were central to the complaint:

...I ask you to not distribute the document [Mr Scholes' letter] further, to tell the people to whom you have distributed it that it should be put to one side, and that you refrain from making such statements in the future. I also ask that you identify the author of the document annexed to your letter, so that I may give consideration to the initiation of proceedings against him.

I ask for these assurances and information forthwith, and in particular, by not later than Monday, 10 September 1990. If you wish more time than that, so that you may take legal advice as to the seriousness of the defamation, please let me know and that will be agreed.

If the assurances are not forthcoming, I will strongly advise my client to put to one side past associations and friendship, and initiate proceedings to put right the damage to his previously unsullied name. Please treat this seriously...

Issues for determination

9. The essential question for determination by the committee can be put as follows:

Did the action of Mr Elder in writing to Mr Scholes in the terms that he did in the letter complained of constitute a contempt?

10. There was no suggestion that the actions of Mr Scholes in publishing his letter to members of his party in his electorate were absolutely privileged, i.e. immune - Mr Scholes confirmed his awareness of this in his evidence to the committee (Evidence, pp 13, 20, for example). The substance of Mr Scholes' concerns was rather his belief that, if he complied with the requests Mr Elder made of him, he (Mr Scholes) would be inhibited in carrying out his duties as a Member.
11. The House does indeed have the power to act to protect a Member from conduct which amounts, or is intended or likely to amount, to an improper interference with the free performance by the Member of his or her duties as a Member (*Parliamentary Privileges Act 1987, section 4*). Thus, although actions such as those of Mr Scholes' which gave rise to Mr Elder's letter may not be absolutely privileged, it is possible for the House to hold that, even if they do not breach any specific right or immunity, they are contempts.
12. Mr Elder's letter is certainly an explicit attempt to influence Mr Scholes. The test to be applied, in the view of this committee, in assessing whether Mr Elder's actions constitute a contempt, and having regard to the requirements of section 4 of the *Parliamentary Privileges Act 1987*, is whether they were improper.
13. The committee appreciates Mr Scholes' perception of the matter. He regards himself as having duties to his electorate and responsibilities in so far as the issue which gave rise to his letter is concerned. The following statements sum up Mr Scholes' thinking on this point:

My duty as a member of parliament is to represent the views of those people, and I believe any action which would inhibit me from doing so would deny the people I represent and this Parliament their proper role in what is a matter of significant and major public comment and public administration (House of Representatives Hansard, 13 September, p 1830).

Firstly, the matter was a matter of significant controversy and discussion within the electorate... (Evidence, p 14).

In my view I think it was a reasonable action of mine as a representative of the area to inform the branch members in the area of some of the information which was being circulated and which was not quite the same as they were receiving in the local media... (Evidence, p 14).

Now I am faced with a situation where I am asked to give certain undertakings as to the future and my understanding is that, if I gave such undertakings, that would encompass almost all avenues of criticism of the operations of Pyramid Geelong building societies and other matters which will come on the public agenda, I would expect, in the next few weeks relating to the same matters (Evidence, p 4).

Possible contempts

14. The committee has considered Mr Scholes' concerns in light of the relevant statutory provisions, and having regard to the precedents available to it.
15. In the view of the committee there are two matters under which the possibility of a contempt could be considered. First, did the action of Mr Elder in writing to Mr Scholes and asking him to take the actions Mr Elder sought, and stating what he (Mr Elder) would do if Mr Scholes did not comply, itself constitute contempt - i.e. was the whole action of Mr Elder in this matter a contempt? On this aspect, the committee recognises the need for Members to be able to act effectively and appropriately in carrying out their responsibilities. Nevertheless, the essential point is that Members do not enjoy absolute immunity in their ordinary work, rather their immunity is confined to their participation in proceedings in Parliament. This narrow drawing of the ambit of absolute privilege reflects a proper concern that the rights and immunities of Members should be limited to those considered absolutely necessary for the performance of their duties and for the work of the House. It reflects a recognition of the legitimate rights of others in the community.
16. Whilst absolute immunity did not protect Mr Scholes in circulating his letter, should Mr Elder's action in writing as he did on 6 September be seen as a contempt? Considering Mr Elder's letter in the context of Mr Scholes' action in distributing the material he did distribute, the committee has concluded that Mr Elder's basic action in writing the letter of 6 September should not be seen as an attempt at improper interference with Mr Scholes' work as a Member. Whilst the committee is mindful of Mr Scholes' position in the whole matter, Mr Elder's letter, in its view, needs to be seen as a response on behalf of a person claiming to be affected by the actions of a Member. The committee does not believe the House would want members of the public to feel that they could not respond, or have responses made on their behalf, in appropriate terms, when matters of personal interest to them arise as a result of the actions of Members.

17. The second possibility is more specific and concerns the request in Mr Elder's letter that Mr Scholes -

'refrain from making such statements in the future'.

It is not clear on the face of it whether this statement should be read as encompassing Mr Scholes' participation in 'proceedings in Parliament'. Mr Scholes has read it this way because he felt that if he gave the assurances sought by Mr Elder, this would inhibit him in his activities in Parliament. He advised the committee, in response to a question "Is your complaint ... because he [Mr Elder] is asking you to refrain from making statements in the House?" as follows:

'... I believed that if I gave such an undertaking it would have to include making such statements in the House ...'

and later

'... I understood him [Mr Elder] to be saying that I should not make such statements in the future. That is all-encompassing as far as I am concerned' (Evidence, pp 11-12).

Nevertheless, Mr Scholes did not feel that Mr Elder's request that he [Mr Scholes] 'refrain from making such statements in the future' was an attempt to intimidate him in performing his work in the Parliament (Evidence, p 11). Furthermore, when asked 'Is your complaint...because he is asking you to refrain from making statements in the House', he answered 'No'.

18. Again, the committee believes that this particular statement of Mr Elder's should be considered in the context of the events which preceded it, namely Mr Scholes' actions in distributing his circular within his electorate. Further there is no explicit reference in the letter to debates or proceedings in the House. In the circumstances, and having regard to the nature of the letter itself and the words actually used, the committee has concluded that there is not sufficient evidence to lead it to a conclusion that the particular statement should be found to constitute an attempt by improper means to influence Mr Scholes in respect of his participation in proceedings in Parliament.
19. The committee believes that its conclusions on the possible contempts are consistent with the precedents as it understands them. Nevertheless, it notes the power of the House to act to protect its Members from actions which, whilst they do not breach any particular right or immunity, do amount to improper interference with the free performance by a Member of his or her duties as a Member and will, in the future, be mindful of its duties to advise the House.

Finding

20. The committee finds that the action of Mr Elder in writing to Mr Scholes in the terms that he did in his letter of 6 September does not constitute a contempt of the House.

Recommendation

21. In view of its finding, the committee recommends that the House take no further action on this matter.

18 October 1990

(G GEAR)
Chairman

PRIVILEGE

Mr SCHOLES (Corio)—Mr Speaker, I wish to raise a matter of privilege.

Mr SPEAKER—The honourable member may proceed.

Mr SCHOLES—On Monday of this week, I received a letter from a firm of solicitors, Dunhill Madden Butler, signed by a Mr A. Elder. In his letter, Mr Elder indicates that he is acting on behalf of Mr Bill Farrow, the major partner in the Farrow Corporation and a director in the Pyramid Building Society.

The letter contains paragraphs which I believe would inhibit me in the passage of my duties as a member of this Parliament and as a representative of the Corio electorate. The House will be aware that the Pyramid Building Society was a major institution in the Geelong area; that some 76,000 persons in the Geelong area held deposits in the Society and, clearly, it is a matter of serious consequence to all persons and particularly parliamentary representatives of that area.

My duty as a member of parliament is to represent the views of those people, and I believe any action which would inhibit me from doing so would deny the people I represent and this Parliament their proper role in what is a matter of significant and major public comment and public administration.

I go to the specific paragraph, which asks me to pre-empt my right to any future comment on these matters, even though anyone who has taken an interest in them would know that I have a series of questions on the *Notice Paper*. I should have thought not unfriendly to the views being expressed by Mr Farrow. The paragraph refers to a document which I distributed to branch members of my Party in my electorate and to the Secretary of the Geelong Trades Hall Council—that being, for the information of honourable members, something under 200 copies by private letter. It was not released by me to the press and it was not published or commented on by me in any media release or in any other fashion. The letter that I received, which is posed in a very courteous fashion—and I acknowledge that—states:

I ask you not to distribute the document further, to tell the people to whom you have distributed it that it should be put to one side, and that you refrain from making such statements in future.

I refer to the last part of that sentence, that I 'refrain from making statements in future'. Anyone who reads the *Notice Paper* will know that I have questions which, once answered, whether they are in favour of or detrimental to the Government, it would be impossible, as a member of parliament, for me not to comment on.

Reports on the activities of Pyramid will be coming out over a period of time and, as the representative of the Corio electorate, it will be my responsibility to make comment on the matter, particularly on behalf of those people who have lost their funds, who are shareholders and who have been deprived.

I have no animosity towards Mr Farrow and I do not think that at any time during the 20-odd years that I have known him or been a member of this Parliament we have had any altercation other than a letter once about what I thought was an improper action in reducing some interest rates.

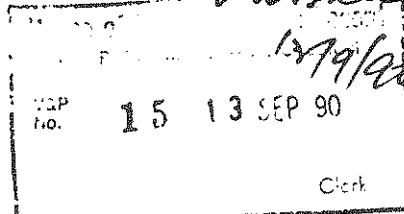
Mr SPEAKER—I think the honourable member for Corio has put before the House the matter that he wished to raise.

Mr SCHOLES—I wish to put certain documents before the House for the consideration of the Privileges Committee. It is possible from my knowledge of privilege that the particular matter is not covered because privilege was, in fact, derived in the eighteenth century and some of the present legal practices were not paramount in those days. I seek leave to table a letter from Dunhill Madden Butler which contains the paragraphs which I find offensive; an attachment to that letter which purports to answer matters which I raised in the circular which I sent out and which, had I not been told I could not distribute, I would have sent to my electorate because it is entitled to know those views too; the letter that was actually sent to the branch members, and the attachment; the report published of the administrator of the Pyramid Building Society which sets out his views of the operation of the society; a series of press releases which were published prior to the making of my statement, which have a total distribution of something in excess of two million, and against none of whom writs have been issued or action taken, clearly indicating that the action threatened against me is to prevent me, as a member of parliament, from taking part in public debate, not a matter of damage, because these articles are far more damaging and potentially damaging to Mr Farrow; finally, a list of members of parliament which was issued by the Friends of Pyramid Building Society which clearly puts my name at the top of that list—the honourable member for Corangamite (Mr McArthur) is second—on a matter which normally would have been of State importance, but which, I think, reflects the importance which is placed on my contribution and my participation in a matter which is of significant importance to my electorate and the people I represent.

I claim, Mr Speaker, that the threat contained in the letter, if I were to comply with it, would inhibit me and prevent me in future from carrying out my duties as a member of this Parliament and thus would prevent this Parliament from having my services on a basis which I would think is right and proper.

Mr SPEAKER—Is leave granted for the documents to be tabled? There being no objection, leave is granted. I will take account of the matter raised by the honourable member for Corio and will report my views back to the House at a later date.

DUNHILL
MADDEN
BUTLER
SOLICITORS & NOTARIES



Our Ref **A. Elder**
Your Ref
Direct Line **617 5838**

September 6, 1990

Hon G. Scholes, M.P.
235 Ryrie Street,
GEELONG. VICTORIA 3220

Dear Sir

Mr R.W.M. FARROW

I act for Mr Farrow, who was the chief executive of the Farrow Group, or as it is often known, the Pyramid Group.

As you may be aware, Mr Farrow has been attending an inquiry by the Inspector, Mr Habersberger QC, for the past few weeks. He has been giving evidence, extensively, on the operations of the Pyramid Group. He has produced documents, and explained how the Group was managed. He has addressed the development of Government policies and statutory law relating to building societies. As you will be aware, both he and his father beforehand, played an extensive role in those matters in this State.

I am aware that you have known the family for a long time. Indeed, Mr Farrow recounted one episode in the early 1970's which I am sure will come back to your mind, at the time when a run took place on Hindmarsh Building Society in South Australia. The family has always been grateful for the service you rendered at that time.

My client was astonished, therefore, to find that you have been distributing to members of the branches of the Labour Party in Corio the document which is attached to your letter addressed to Branch members (attached). It is in error in almost every respect. Let me assure you that we do not make that observation lightly. Mr Farrow has been giving his evidence on oath, subject to scrutiny by a highly regarded Queens Counsel. What is said in the attached article could not be further from the truth. It contains outrageous lies. What is more, when the Inspector

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completes his investigations (which will take some months), that will be known to the world if the Government sees fit to publish his report. We attach an appendix which analyses each answer. You should attend to it.

The difficulty that presents itself to me is that your letter has brought my client into disrepute. It is highly defamatory, and has done him (and the other Board members) a great injustice and significant harm.

The harm takes on greater significance when in your covering letter you acknowledge, and I quote:

Messrs Farrow and Clarke may have been totally conscientious and done their best, they may be moral and highly christian gentlemen, I have no argument with that.

If that is so, I am at a loss to understand how you came to spread such a defamatory document about. You did so without first consulting them, without checking your facts, and without caring, so it would appear, whether those facts were true or false. I assume in your favour that the deed was done without malice, though I make no such assumption in respect of the author of the attachment.

Given the long association between my client, his family and yourself, there is a reluctance by my client to initiate proceedings for damages against you. My client has no reluctance about doing so out of fear of the outcome of such proceedings. I have his firm instructions to issue proceedings against the Attorney General of Victoria for similar remarks he has made, and I am carrying out those instructions. That will be so in respect of anyone else who makes such remarks.

In your case, however, my client is reluctant by reason of the family association. I ask you to not distribute the document further, to tell the people to whom you have distributed it that it should be put to one side, and that you refrain from making such statements in the future. I also ask that you identify the author of the document annexed to your letter, so that I may give consideration to the initiation of proceedings against him.

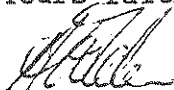
I ask for these assurances and information forthwith, and in particular, by not later than Monday 10 September 1990. If you wish more time than that, so that you may take legal advice as to the seriousness of the defamation, please let me know and that will be agreed.

If the assurances are not forthcoming, I will strongly advise my client to put to one side past associations and friendship, and initiate proceedings to put right the damage to his previously unsullied name. Please treat this seriously. Mr Farrow has been subjected to a campaign of

denigration that has shown no restraint. It is utterly without merit and I, his lawyer, do not intend to see him suffer without compensation of a very large order.

I await your reply.

Yours faithfully,



A. ELDER
Partner
DUNKILL MADDEN BUTLER

PRIVILEGE

Mr SPEAKER—Last Thursday the honourable member for Corio (Mr Scholes) raised as a matter of privilege a letter which had been sent to him by a firm of solicitors, Dunhill Madden Butler. The honourable member quoted from certain paragraphs in the letter and stated that if he were to comply with the requests set out in the letter it would result in his being inhibited in the performance of his duties as a member of this House and as a representative of the Corio electorate.

The letter about which the honourable member complains, among other matters, asks him not to distribute further a document which he had distributed to members of branches of the Australian Labor Party in Corio relating to the activities of the Farrow Group, or as it is often known, the Pyramid Group, and asks the honourable member to tell people to whom the document had already been distributed to put it to one side. The document also asks the honourable member to refrain from making such statements in the future.

The letter goes on to say that if the assurances sought are not forthcoming the writer will strongly advise his client to initiate legal proceedings against the honourable member for Corio. *House of Representatives Practice* states:

To attempt by any improper means to influence a Member in his or her conduct as a Member is a contempt. So too is any conduct having a tendency to impair a Member's independence in the future performance of his or her duty

A United Kingdom House of Commons Committee of Privileges reporting in a somewhat similar case in 1947 had this to say:

Your Committee think that the true nature of the privilege involved in the present case can be stated as follows: It is a breach of privilege to take or threaten action which is not merely calculated to affect the Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.

Section 4 of the Australian Parliamentary Privileges Act 1987 states:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

The question to be determined therefore is whether the letter amounts to an improper interference with the free performance by the honourable member for Corio of his duties as a member. I can appreciate the honourable member's concerns in this matter. Whilst he acknowledges that the letter is written in a courteous manner, he feels that if he complies with the requests made he would be inhibited in the performance of his duties as a member.

The letter is certainly an attempt to influence him—it makes certain requests of him. The key question is whether it constitutes an attempt at improper influence. In considering this aspect, I believe the letter needs to be seen in light of the matters referred to in it: actions of the honourable member in writing to certain persons and distributing material concerning the Farrow Group.

Having carefully considered the material and the arguments that have been put before me in this particular matter, I believe this is a borderline case upon which the House would benefit from the advice of the Committee of Privileges. In these circumstances, I am prepared to allow precedence to a motion to refer the matter to the Committee of Privileges if the honourable member for Corio wishes to so move.

Motion (by Mr Scholes) agreed to:

That the letter of 6 September 1990 from Mr A. Elder of Dunhill, Madden and Butler, to the honourable member for Corio be referred to the Committee of Privileges.

INQUIRY INTO REFERENCE BY THE HOUSE
TO THE COMMITTEE OF PRIVILEGES
OF THE LETTER OF 6 SEPTEMBER
FROM MR A ELDER OF DUNHILL MADDEN BUTLER TO
THE HONOURABLE MEMBER FOR CORIO

Memorandum by the Acting Clerk of the House of Representatives.

This memorandum has been prepared for the use of the House of Representatives Committee of Privileges in connection with its inquiry into the reference to it of the letter of 6 September from Mr A Elder of Dunhill Madden Butler to the honourable Member for Corio.

THE REFERENCE

On 13 September Mr Scholes raised, as a matter of privilege, a letter dated 6 September he had received from Mr A Elder of Dunhill Madden Butler. A copy of the Hansard proof Hansard record of Mr Scholes' statement to the House is at 'A'. I understand that copies of the letter and other papers tabled by Mr Scholes have been provided to the Committee.

On 17 September, Mr Speaker gave his decision on the matter, and priority was given to a motion to refer the question to the Committee of Privileges. A copy of the proof Hansard record of Mr Speaker's statement is at 'B'.

CONSTITUTIONAL PROVISIONS - GENERAL CHARACTER OF
PRIVILEGE AND CONTEMPT

House of Representatives Practice quotes May's definition of parliamentary privilege as:

... the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.

It goes on to explain the source of the privilege powers of the Houses of the Commonwealth Parliament:

The Commonwealth Parliament derives its privilege powers from section 49 of the Constitution which provides that:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In addition, section 50 of the Constitution provides that:

Each House of the Parliament may make rules and orders with respect to -

- (i.) The mode in which its powers, privileges, and immunities may be exercised and upheld;
- (ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

Statutory provisions -

In 1987 the Parliament enacted comprehensive legislation under the head of power constituted by section 49 of the Constitution. The *Parliamentary Privileges Act 1987* provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the Members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of the Act,

continue in force.³

BREACH OF PRIVILEGE AND CONTEMPT

The privileges of the Houses, their committees and Members are rights and immunities that are part of the law of the land. An infraction or attempt or threat of infraction of one of these rights or immunities may be described as a breach of privilege.

The Houses also possess the power to take action to protect themselves, their committees and members from actions which, whilst perhaps not breaching any specific right or immunity, obstruct or impede, or threaten to obstruct or impede. A good example is disobedience of an order of a House.

Halsbury's Laws of England states -

The power of both Houses to punish for contempt is a general power similar to that possessed by the superior courts of law and is not restricted to the punishment of breaches of their acknowledged privileges.⁴

May describes contempt as follows:

Generally speaking any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.⁵

Save for the changes made by the *Parliamentary Privileges Act 1987*, the Houses of the Commonwealth Parliament have the powers, privileges and immunities of the House of Commons as at 1901. Amongst those powers is the power to hold various actions or omissions as contempts. This is not to say that a recurrence now, or in the future, of any act or omission which is the same or very similar to an act or omission held by the House of Commons to be a contempt in the years before 1901 must now be determined in the same way. It is the power to punish contempts which is inherited, the application of the power is for the judgment of the House, usually in light of advice from the Committee of Privileges.

One particularly important qualification on the power to punish for contempts was introduced by the *Parliamentary Privileges Act 1987*. Section 4 provides that:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the

free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

This important provision should be taken into account at all stages in the consideration of possible contempts. The House has not, to date, made decisions which indicate its interpretation of the meaning of the provision, although it has often been referred to in the House. It is also important to recognise that the Act does not codify or enumerate acts or omissions that may be held to constitute contempts.

PARTICULAR REFERENCES RELEVANT TO

THE MATTER REFERRED TO THE COMMITTEE

House of Representatives Practice states:

Arrest and molestation

It is also a contempt to molest a Member while attending, coming to, or going from the House. Similarly, it is a contempt to attempt to influence a Member in his or her conduct by threats or to molest any Member on account of his or her conduct in the Parliament.

and later:

Attempted intimidation of Members

To attempt by any improper means to influence a Member in his or her conduct as a Member is a contempt. So too is any conduct having a tendency to impair a Member's independence in the future performance of his or her duty, subject, since 1987, to the provisions of the Parliamentary Privileges Act.

May states:

To molest Members on account of their conduct in Parliament is also a contempt. Correspondence with Members of an insulting character in reference to their conduct in Parliament or reflecting on their conduct as Members, threatening a Member with the possibility of a trial at some future time for a question asked in the House, calling for his arrest as an arch traitor, offering to contradict a Member from the gallery, or proposing to visit a pecuniary loss on him on account of conduct in Parliament have all been considered contempts. The Committee of Privileges has made the same judgment on those who incited the readers of a national newspaper to telephone a Member and complain of a question of which he had given notice.

and later

Conduct not amounting to a direct attempt improperly to influence Members in the discharge of their duties but having a tendency to impair their independence in the future performance of their duty may be treated as a contempt. An example of such a case is the Speaker's ruling that a letter sent by a parliamentary agent to a Member informing him that the promoters of a private bill would agree to certain amendments provided that he and other members refrained from further opposition to the bill constituted (under the procedure then in force) a *prima facie* breach of privilege.

Benn case (1974)

The closest precedent found to the present case occurred in 1974, involving Mr Wedgwood Benn, MP. In November 1973 a firm of solicitors acting for the Aims of Industry organisation wrote to Mr Benn regarding a speech he had made outside the House. Their letter quoted an allegedly defamatory passage and asked him to confirm that he had been correctly reported. The letter stated that the solicitors had been instructed not to institute proceedings forthwith but to seek Mr Benn's comments, meanwhile reserving all rights etc. It concluded

'If any further defamation of our clients is made by you, however, we must make it quite clear that we are instructed to commence proceedings and to seek damages'.

Mr Benn spoke in the House on 17 January 1974 and apparently attacked the organisation. On 21 January the solicitors wrote to Mr Benn again, saying they had considered an acknowledgment received from his office to the effect that their earlier letter had been noted, and stating that they had been instructed to commence proceedings.

Mr Benn claimed that the threat in the letter of 21 January arose from his speech in the House on 17 January and the matter was referred to the Committee of Privileges.

The committee heard Mr Benn's interpretation of the letter of 1 November, which was to the effect that he was to consider himself under threat if he made any reference to the Aims of Industry organisation that they considered defamatory whether - since there was no express exclusion of proceedings in the House - the reference was made in Parliament or elsewhere.

The committee examined the solicitors' files, and concluded:

Whilst it is true that the Solicitors' letter did not expressly distinguish between words spoken in Parliament and words spoken outside, Your Committee have seen no evidence which suggests that the letter was intended to refer to words spoken in Parliament.

Your Committee's examination of the Solicitors' files have satisfied them that it was never the intention of Aims of Industry or their Solicitors to suspend indefinitely the possibility of instituting proceedings in respect of the October speech, but that their intention was to suspend further steps in this direction while awaiting Mr Benn's comments. Such suspension would lapse immediately if "any further defamation" occurred.

Your Committee have considered whether Mr Benn's speech in the House, or the knowledge that he was due to make a speech on company law, influenced Aims of Industry, or their Solicitors in their conduct of their clients' case. They are satisfied that there is no evidence to indicate that this was so. The letter of 21st January was a natural sequel to other communications between the Solicitors and their clients, and between them and Mr Benn, which had taken place in December and January.

Your Committee accordingly find that there was no contempt in this case.¹⁰

Strauss case (1957)

In 1957 the London Electricity Board threatened libel action against Mr Strauss, MP, who had written to a Minister criticising certain matters within its area of responsibility. This case went to the Committee of Privileges, which found -

- . that in writing the letter Mr Strauss had been engaged in a 'proceeding in Parliament' (for the significance of this see below);
- . that in threatening a libel action against the Member, both the Board and its solicitors had acted in breach of the privilege of Parliament.

When the matter eventually came to a vote in the House, the House rejected a motion agreeing with the committee's report (by a narrow margin) and an amendment declaring that the letter was not a proceeding in Parliament and that no breach of privilege had been committed was carried.¹¹

Parry case (1982)

In this case solicitors wrote to Mr Parry, MP on behalf of a client rejecting statements Mr Parry had made in the House, expressing concern at his conduct and saying 'in due course the client would revert to it in.....proceedings if you have not in the meantime taken appropriate steps....' It seems that an action against another party had been commenced, and that Mr Parry's speech was seen as aggravating the problem.

The solicitor apologised, but the matter was still referred to the Committee of Privileges. It noted, inter alia, that the proceedings in train involved action against another party, that

the solicitor's threat 'if such it can be described' may well have had so little substance as to be barely capable of being considered to be a contempt of the House. It noted the policy of restraint in privilege matters and recommended that no further action be taken.

The independence of Members

Brown Case (1947)

In a notable case the House of Commons Committee of Privileges in 1947 inquired into a complaint that certain actions of the Executive Committee of the Civil Service Clerical Association were calculated, improperly, to influence a Member (Mr Brown) in the exercise of his parliamentary duties. Mr Brown had for many years been employed as General Secretary of the Association. Upon his election to Parliament, the Association entered into a contractual relationship with Mr Brown that, whilst remaining a Member, he would hold the appointment of Parliamentary General Secretary and would continue to receive a salary and certain other not insignificant advantages, although his contract with the Association entitled him 'to engage in his political activities with complete freedom'. Mr Brown complained that the cumulative effect of a sequence of events over a period of time was such as to bring pressure to bear upon him to alter his conduct as a Member of Parliament and to change the free expression of his views under the threat that, if he did not do so, his position as an official of the Association would be terminated or rendered intolerable. Following an extensive inquiry, the Committee of Privileges found that, in the particular circumstances, the action of the Executive Committee of the Association did not in fact affect Mr Brown in the discharge of his parliamentary duties. However, in its report the committee stated:

Your Committee think that the true nature of the privilege involved in the present case can be stated as follows:

It is a breach of privilege to take or threaten action which is not merely calculated to affect the Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.

'Bankstown Observer' (Browne/Fitzpatrick) case: On 8 June 1955, the Committee of Privileges reported to the House that it had found, inter alia:

That Messrs R Fitzpatrick and F Browne were guilty of a serious breach of privilege by publishing articles intended to influence and intimidate a Member (Mr Morgan), in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against him, for the express purpose of discrediting and silencing him. The committee

recommended that the House should take appropriate action.

That there was no evidence of improper conduct by the Member in his capacity as a Member of the House.

Other precedents involving the independence of Members are noted at Attachment 3.

WHAT IS THE SUBSTANCE OF THE COMPLAINT?

Key points in the letter from Mr Elder are:

- a request to Mr Scholes to not distribute further a document which, Mr Elder says, Mr Scholes had been distributing to members of the branches of the Labor Party in Corio;
- a request that Mr Scholes tell the people to whom he had, according to Mr Elder, distributed the document that it should be put to one side;
- a request that Mr Scholes "refrain from making such statements in the future"; and
- a request that Mr Scholes "identify the author of the document annexed to your letter" so that Mr Elder may give consideration to the initiation of proceedings against him;
- Mr Elder asks "for these assurances and information forthwith" and goes on to say " -

If the assurances are not forthcoming, I will strongly advise my client to put to one side past associations and friendship, and initiate proceedings to put right the damage to his previously unsullied name.

Mr Scholes has stated, inter alia:

The letter contains paragraphs which I believe would inhibit me in the passage of my duties as a member of this Parliament and as a representative of the Corio electorate.

My duty as a member of Parliament is to represent the views of those people, and I believe any action which would inhibit me from doing so would deny the people I represent and this Parliament their proper role in what is a matter of significant and major public comment and public administration.

I go to the specific paragraph, which asks me to pre-empt my right to any future comment on these matters, even

though anyone who has taken an interest in them would know that I have a series of questions on the *Notice Paper*, I should have thought not unfriendly to the views being expressed by Mr Farrow. The paragraph refers to a document which I distributed to branch members of my Party in my electorate and to the Secretary of the Geelong Trades Hall Council - that being, for the information of honourable members, something under 200 copies by private letter. It was not released by me to the press and it was not published or commented on by me in any media release or in any other fashion. The letter that I received, which is posed in a very courteous fashion - and I acknowledge that - states:

I ask you not to distribute the document further, to tell the people to whom you have distributed it that it should be put to one side, and that you refrain from making such statements in the future.

I refer to the last part of that sentence, that I 'refrain from making statements in future'. Anyone who reads the *Notice Paper* will know that I have questions which, once answered, whether they are in favour of or detrimental to the Government, it would be impossible, as a member of Parliament, for me not to comment on.

Reports on the activities of Pyramid will be coming out over a period of time and, as the representative of the Corio electorate, it will be my responsibility to make comment on the matter, particularly on behalf of those people who have lost their funds, who are shareholders and who have been deprived.

I claim, Mr Speaker, that the threat contained in the letter, if I were to comply with it, would inhibit me and prevent me in future from carrying out my duties as a member of this Parliament and thus would prevent this Parliament from having my services on a basis which I would think is right and proper.

ASSESSMENT OF THE COMPLAINT

Two major issues to be considered in relation to the complaint are first, the nature of the action Mr Scholes has been engaged in, and secondly, the character or nature of the action of Mr Elder and, in particular, of his statement as to his proposed action if Mr Scholes does not provide the "assurances" he has sought.

Mr Scholes' actions not part of 'proceedings in Parliament'

An important point to note is that parliamentary privilege (in the sense of legal immunity from suit or prosecution) does not extend to actions such as the circulation of material from Members to citizens in the ordinary course of their electorate

work. The actions and statements of Members which enjoy absolute privilege are narrowly defined and limited to those involved in their participation in "proceedings in Parliament" - see article 9 of the Bill of Rights, which has been supplemented, in respect of the Commonwealth Parliament, by section 16 of the *Parliamentary Privileges Act 1987*.

The actions of Mr Scholes, if established (and he appears to concede this in his statement in the House), in writing to members of branches of the Labor Party in Corio and distributing a document to them are not, in a technical sense, part of "proceedings in Parliament" and have not been claimed by Mr Scholes to be so. Therefore, legally, these actions are not absolutely privileged or immune.

Nevertheless, because of the nature of the House's ability to protect itself, its committees and its Members, it may hold that certain actions, even if not breaching any particular privilege or immunity, are contempts.

Whilst there has been a reluctance to extend the categories of contempt, it is possible for the House to regard any action which is seen as constituting an improper interference with the free performance by a Member of the Member's duties as a Member as a contempt.

This means, for example, that the House may, if it wishes, take action to protect Members in activities other than those associated with their participation in "proceedings in Parliament" if it believes it necessary to do so to protect the Member's capacity to discharge his or her duties as a Member. It is noted however that phrases such as 'conduct in Parliament' are often used in the precedents, signifying the traditional view that the range of actions in which a House should act to protect Members should be limited and perhaps an awareness that, by definition, as the ambit of protection of Members is increased, the rights of other individuals are in a sense diminished.

In 1986 the House referred to the Committee of Privileges a complaint from Mr W P Coleman, MP. Advertisements had been placed in the Sydney Morning Herald, without his knowledge, listing his electorate office telephone number as the contact number in two classified advertisements. Mr Coleman found that for a period the work of his electorate office was disrupted. In this case the Committee concluded:

The realities of political and public life are such that Members from time to time are subjected to various forms of inconvenience or irritation as a consequence of being Members of Parliament. The difficulty is to distinguish between what may be regarded as reasonable or acceptable forms of expression and protest on matters of public interest, and actions which go beyond this and constitute harassment or obstruction of a Member in the discharge of his or her duties. Those who would interfere with the work of a Member, or a Member's office, should remember that it

is not only the Member and the Member's staff who may suffer but more importantly constituents and other citizens who may need to contact the Member and who may in fact suffer serious disadvantage if they are prevented from, or experience delays in, communicating with the Member, or if the Member or the Member's staff are obstructed in attending to the concerns or needs in question.

and later -

The committee is mindful of the effect of the unwanted telephone calls on the work of Mr Coleman's electorate office and has an appreciation of the disruption suffered. The actions which gave rise to these calls are to be deprecated. Although it does not believe that in all the circumstances any further action should be taken on this particular complaint, the committee wishes to make it clear that harassment of a Member in the performance of his or her work as a Member by means of repeated, or nuisance or orchestrated telephone calls could be judged a contempt. Members must be able to seek the protection of the House in such matters.

Mr Elder's letter

The Committee will need to consider the substance of Mr Elder's letter. It may wish to assess the requests to not distribute further the document allegedly distributed, and to tell those to whom it was distributed to put it to one side. It may take the view that such requests should be seen as reasonable in that presumably citizens should feel able to express views on matters that affect them and make requests of Members.

The request that Mr Scholes "refrain from making such statements in the future" is less clear. The Committee may feel that, in the context of the actions and circumstances claimed by Mr Elder, this request is meant to refer to statements of the kind complained of in terms of content. A further point is whether the reference to "such statements" ought also to be read as meaning statements made in the same manner as those complained of - if the facts are as alleged, by distribution in a documentary form. If, on the other hand, the request is also seen as referring to statements in the House, then the Committee may regard that as a different matter in that, if this is the case, it could be seen as an attempt to influence Mr Scholes in relation to his conduct in the House. The question would then arise as to whether this constitutes 'improper interference' with the free exercise by a ... Member of the Member's duty as a Member.

The Committee would also perhaps want to evaluate the nature of the action foreshadowed by Mr Elder if the "assurances" he seeks are not forthcoming. He states that he:

"will strongly advise my client to put to one side past associations and friendships and initiate proceedings to

put right the damage to his previously unsullied name".

This is a statement of Mr Elder's intent, it is not an indication as to whether or not proceedings would be initiated. The Committee would also note that in this sentence Mr Elder does not name Mr Scholes, although in the circumstances it may think that the only sensible inference is that the proceedings contemplated would involve Mr Scholes.

CONSIDERATION BY THE COMMITTEE

The committee has been charged by the House with the responsibility of advising it in relation to this matter. It would seem that the committee would need to consider the basic law involved, whatever principles and precedents it may consider relevant, and the circumstances and details of the particular matter complained of.

The committee must have regard to the provisions of section 4 of the *Parliamentary Privileges Act 1987*, but it may also wish to have regard to the general approach, in recent times, to matters of privilege and contempt in the House of Commons.

On 6 February 1978 the House of Commons, in a significant decision, agreed with a recommendation of its Committee of Privileges, which had reviewed the recommendations of the 1966-67 Select Committee on Parliamentary Privilege which had recommended major changes. In particular, the House agreed with a recommendation that it -

.....should follow the general rule that its penal jurisdiction should be exercised (a) in any event as sparingly as possible and (b) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its Members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions.¹⁶

No decision has been made to adopt such a policy in the Commonwealth Parliament although it was recommended in the 1984 report of the Joint Select Committee on Parliamentary Privilege.¹⁷ This approach has however been cited in the House by successive Speakers, and it has been adopted by resolution in the Senate.¹⁸

In discharging its responsibilities, the committee has substantial powers. In the first place, by virtue of section 49 of the Constitution, the UK Parliamentary Witnesses' Oaths Act 1871 applies. That Act enabled committees of the House of Commons to administer oaths to witnesses and that power is enjoyed by the Committee of Privileges.

Secondly, the committee has power to "send for persons, papers and records". These powers are backed by the authority of the House itself.

The scope of any inquiry by the committee comprises not only the specific matter, but also the facts relevant to it.

Committees of privileges both in the UK and Australia have, as well as making findings on particular complaints, made recommendations to the House as to what action it might take. Examples have included -

- . that no contempt or breach is involved;
- . that the dignity of the House is best maintained by taking no action;
- . that the matter could constitute a contempt but it is inconsistent with the dignity of the House to take action;
- . that a technical contempt had been committed but further action would give added publicity and be inconsistent with the dignity of the House;
- . that a contempt of the House had been committed but, in view of the (humble) apology tendered, no further action is recommended;
- . that a contempt of the House had been committed but the matter was not worthy of occupying the further time of the House;
- . that no further action be taken against the editor provided that, within such time as the House may require, he publishes in a prominent position in his newspaper an apology to the following effect
- . that the company concerned, the advertising agency and the editor of the newspaper in which the advertisement was published are guilty of a (serious) contempt and should be (severely) reprimanded;
- . that a serious contempt (breach) has been committed and the House should.....

There is, of course, nothing binding about this list, and the Committee may express its findings and any recommendations as it chooses.

(L M Barlin)
Acting Clerk of the House

20 September 1990

ENDNOTES

1. House of Representatives Practice, A R Browning (ed) AGPS, Canberra, 1989, p.682
2. Op cit, p.682
3. Act No. 21 of 1987, s.5
4. Halsbury's Laws of England, 4th edn, vol 34, para 1500
5. May, p 21st edn, p115
6. House of Representatives Practice, p706
7. Op cit, p706
8. May, p126
9. May, p129
10. H.C. 246 (1974), p.iv
11. H.C. 305 (1956-57) p. viii; H.C. Deb 591 (8.7.58) 245
12. H.C. 233 (1982)
13. House of Commons Committee of Privileges Report
H.C. 118 (1947) xii, quoted in
House of Representatives Practice, p707
14. House of Representatives Practice, p706
15. House of Representatives Committee of Privileges report
'Disruption caused to the work of the electorate office of
the House Member for Wentworth made in response to false
advertisements in the Sydney Morning Herald of 20 September
1986' (pp282 (1986)), pp4-5
16. H.C. 417 (1976-77) pp iii-iv
17. PP 219 (1984)
18. Journals of the Senate, 1987-89, pp520, 536

**MINUTES OF PROCEEDINGS
OF THE COMMITTEE**

(Sections of the minutes concerning another inquiry
in progress have been deleted)



COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House - Canberra

Tuesday, 18 September 1990

(36th Parliament - 1st meeting)

PRESENT: Mr N A Brown Mr Johns
 Mr Costello Mr Reith
 Mrs Crosio Mr Snow
 Mr Dobie Mr Snowdon
 Mr Gear

The Committee met at 5.05 pm.

The following extracts from the Votes and Proceedings were reported by the Secretary -

No. 6 - 16 May 1990 - appointing members of the Committee.

No. 16 - 17 September 1990 - the reference to the Committee of the letter of 6 September 1990 from Mr A Elder of Dunhill Madden Butler to the Honourable Member for Corio.

On the motion of Mr Johns, Mr Gear was elected Chairman.

On the motion of Mr Costello, Mr Brown was elected Deputy Chairman.

Resolved (on the motion of Mr Reith) - That a submission be sought from the Clerk on the matter before the Committee.

The Committee deliberated.

The Committee adjourned until a time and date to be fixed.

Confirmed.


CHAIRMAN



COMMITTEE OF PRIVILEGES
MINUTES OF PROCEEDINGS

Parliament House - Canberra
Thursday, 20 September 1990

(36th Parliament - 2nd meeting)

PRESENT:

Mr Gear (Chairman)	
Mr N A Brown	Mr Johns
Mr Costello	Mr Reith
Mrs Crosio	Mr Snow
Mr Dobie	Mr Snowdon

The committee met at 9.05 pm.

The minutes of the meeting held on 18 September were confirmed.

The committee noted two declarations by Mr Costello in connection with the reference of 17 September.

The Chairman reported receipt of advice from Mr Beazley nominating Mr Holding to serve on the committee at the meeting.

The committee deliberated.

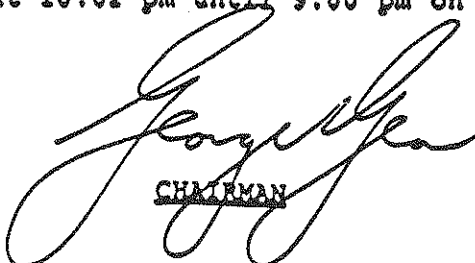
Resolved (on the motion of Mr Reith) - That Mr G G D Scholes, MP be invited to appear before the committee to answer questions on the matter referred to the committee on 17 September and that he be advised that he may be accompanied by counsel or an adviser.

The committee deliberated.

The committee deliberated.

The committee adjourned at 10.02 pm until 9.00 pm on Thursday, 11 October 1990.

Confirmed.


CHAIRMAN

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House - Canberra

Thursday, 11 October 1990

(36th Parliament - 3rd meeting)

PRESENT: Mr Gear (Chairman)

Hon N A Brown
Mr Costello
Hon J A Crosio
Hon J D M Dobie

Mr Johns
Mr Lavarch
Mr Reith
Mr Snow
Mr Snowdon

The committee met at 9.10 pm.

The minutes of the meeting of 20 September were confirmed.

The Chairman presented a letter dated 11 October from the Leader of the House nominating Mr Lavarch to serve on the committee during its current inquiries.

Reference of letter of 6 September from Mr A Elder to
Hon G G D Scholes, MP

The committee deliberated.

The Hon Gordon Glen Denton Scholes, MP was called, sworn and examined.

The witness withdrew.

The committee deliberated.

RESOLVED (on the motion of Mr Brown) - That the committee finds that the matter referred to it (viz. the letter of 6 September from Mr A Elder to Hon G G D Scholes, MP) is not a breach of privilege.

RESOLVED (on the motion of Mr Costello) - That the transcript of evidence taken in connection with the reference be authorised for publication. (subsection 2(2) of the *Parliamentary Papers Act*).

At 11.05 pm the committee adjourned until 8.15 pm, Thursday,
18 October 1990.

CONFIRMED

(G GEAR)
Chairman

